(11)

No. 868

In the

Supreme Court of the United States

October Term 1942

DORA BRADY AND LUCINDA WATASHE, *Petitioners,*

VERSUS

ANNIE BEAMS, *ET AL., Respondents.*

Answer to Petition for Writ of Certiorari.

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AUTHORITIES.

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ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

Statement.

"This case is an epilogue to *Scott* v. *Beams,* 10 Cir., 122 F. 2d 777, certiorari denied, 315 U. S. 809, 62 S. Ct. 795, 86 L. ed. 1209, rehearing denied, 315 U. S. 830, 62 S. Ct. 912, 86 L. ed. 1224." (Excerpt from opinion in *Brady* v. *Beams,* 132 F. (2d) 985.)

For the true facts please see the decisions of the United States Circuit Court of Appeals for the Tenth Circuit in *Scott* v. *Beams,* and in *Brady* v. *Beams.* The facts here complained about were at issue in *Scott* v. *Beams* and were there determined in favor of the Respondents and against the Petitioners. The substance of petitioners' attack is found in the charge that the trial judge in the original case, together with Annie Beams, *et al.,* the successful parties, and their attorneys of record, and C. W. Miller, Assistant U. S. Attorney for the Eastern District of Oklahoma, had an understanding before the trial whereby it was agreed that if the Secretary of the Interior approved the Family Settle-

ment Agreement entered into by Annie Beams and others, judgment would be rendered, regardless of what might be shown at the trial, in favor of the parties to the settlement and against all other claimants to the large estate involved, in number about eight hundred. And it is claimed that judgment was entered in accordance with said alleged understanding.

The only evidence invoked in support of this charge was the following: Whilst considering the Family Settlement Agreement the Secretary of the Interior sought the advice of the Attorney General, who then requested C. W. Miller to inquire of the trial judge as to whether or not he would regard the approval of the settlement agreement as contemptuous. The trial judge answered this query in the negative. Thereupon Mr. Miller reported to the Attorney General by letter.

All these matters were pleaded, heard and determined in the original case. All the pleadings and all the evidence with respect to these matters were considered and determined against petitioners in *Scott* v. *Beams*, and again in *Brady* v. *Beams*. The decisions of the Circuit Court of Appeals with reference to these points appear in the main in *Scott* v. *Beams*, 122 F. (2d) at pages 788, 789, and in *Brady* v. *Beams*, 132 F. (2d) at page 988.

Petitioners made the same contentions in the Supreme Court in their petition for writ of certiorari and supporting brief in *Dora Brady, et al.* v. *Annie Beams, et al.*, No. 829, October Term, 1941. When this Court denied the petition for the writ, petitioners again made the same contentions in their petition for rehearing.

This case, No. 782-Civil, was commenced and has been prosecuted as a continuation of the original case No. 4556-Equity in the United States District Court for the Eastern

District of Oklahoma, which was an action primarily for the purpose of determining the heirs of Jackson Barnett, deceased, who was a restricted Creek Indian. Instead of service in ordinary manner, notice was served upon some of the attorneys for respondents, which notice recited that the procedure was under the authority of *Hanna* v. *Brictson Mfg. Co.*, 62 F. (2d) 139, and the cases there cited. The *Hanna* case holds, as announced in the 12th paragraph of its head notes:

> "Cause of action to set aside decree held continuation of original suit in which decree was entered, therefore service of subpoena within state on parties to original suit was not necessary."

In this connection respondents call attenion to *Alexander* v. *Hillman*, 296 U. S. 222, 80 L. ed. 192, where it was said:

> "The ancillary bill is not an original bill for the commencement of a suit. That it was not so intended is shown by the fact that process was not prayed or issued."

Petitioners contend that cause No. 782-Civil is a new independent action upon the ground of extrinsic fraud discovered after their appeal in *Scott* v. *Beams* was lodged in the appellate court. Respondents moved to dismiss, or in the alternative to strike, petitioners' complaint in the new case. (Petitioners' appendix, Case No. 868, pp. 19, 20.) The grounds alleged in support of the motion to dismiss in brief are these: *(1)* The complaint presents only a pretended bill of review or a pretended action in the nature of a bill of review, and same was filed without leave of the appellate court whose judgment is under attack; *(2)* The complaint is inexcusably scandalous, scurrilous, and clearly vexatious, and constitutes contempt of court; *(3)* The complaint does not state any claim against the defendants upon which any

relief can be granted; *(4)* Inexcusable delay and laches are shown; *(5)* The complaint affirmatively shows upon its face that all the matters and things sought to be presented again were fully and finally adjudicated against Dora Brady and Lucinda Watashe in the original case.

Respondents presented to the district court the entire record in the original case, and the trial court took notice of these records. In fact this entire record in the original case went to the Circuit Court of Appeals, and from there to the Supreme Court, with the petition of Dora Brady and Lucinda Watashe for writ of certiorari. The records of which the district court took judicial notice were precisely the same as the records which went to the Circuit Court of Appeals and to the Supreme Court.

Respondents contend that the plea of former adjudication goes only to the petitioners' want of right to maintain the new action, and supports respondents' claim that the new bill was properly dismissed because it presents only a pretended bill of review or pretended action in the nature of a bill of review. The district court considered the first and fifth grounds for dismissal together, rather than separately, and so recited in its judgment of dismissal. The dismissal was upon the theory that the court should protect the successful parties from a re-trial of the issues already tried and determined, and arrest *in limine* the attempt to circumvent its own judgment, affirmed by the Circuit Court of Appeals. The decision of the Circuit Court of Appeals in *Brady* v. *Beams* is upon the same theory.

The bill of complaint in the new case and the petition for writ of certiorari and supporting brief abound in misstatements of fact such as the following: It is falsely alleged that Dora Brady and Lucinda Watashe and their counsel did not discover the facts about the conference

which Mr. Miller had with the trial judge, or the Miller letter to the Attorney General, until after petitioners had lodged their appeal from the judgment in the original cases, in the appellate court. In fact the evidence in full with respect to these matters was heard in due course in the district court trial and made part of the record which was taken to the Circuit Court of Appeals. If there is any difference between petitioners' bill in the original case and their bill in cause No. 868, it consists only in this false statement, which respondents contend should be disregarded.

The Circuit Court of Appeals did not hold, as claimed by petitioners, that the district court erred in taking judicial notice of its own records. It is not true, as asserted by petitioners, that the Circuit Court of Appeals held that the new bill does not present a bill of review or action of that nature. It is not true, as asserted by petitioners, that the Circuit Court of Appeals held the judgment of dismissal erroneous. In fact, there was no holding by the appellate court that the district court erred in any respect. It is true that the appellate court turned its decision largely upon the proposition that all the matters sought to be tried again were fully heard and adjudicated in the original case.

It is not true, as contended by petitioners, that the respondents orally or otherwise abandoned parts of their contentions.

BRIEF *and* ARGUMENT.

I.

Respondents contend that the petition for writ of certiorari and supporting brief should be treated as self-denying for failure to comply with Rule 38, paragraph 2, which requires clarity and brevity.

The petition for the writ consists of 53 long typewritten pages. The appendix, made a part of the petition, consists of 114 long typewritten pages, making a total of 167 pages.

II.

The petition for writ of certiorari does not state any sufficient ground for issuance of the writ.

There is no constitutional question involved or other matter presented on account of which the writ of certiorari should issue.

III.

The district court did not err in taking judicial notice of its own records in the original case. But had it erred, the error would have no importance here, because the appellate court had its own records before it, which were the same as those of the trial court.

The district court judgment of dismissal was not upon the merits of petitioners' claims. It was merely upon the procedural grounds that the bill was filed without leave of the Circuit Court of Appeals, whose judgment was under attack; that it was necessary for the court's own protection to dismiss and thereby defeat the flagrant attempt to circumvent the judgments of the district court and the judgment of the appellate court, and that it was necessary to protect the successful parties from a retrial of the same

matters finally determined. In short, the district court merely determined that Dora Brady and Lucinda Watashe had no right to maintain their pretended suit in that court.

It may be admitted that in course of a trial upon the merits, ordinarily a trial court will not take judicial notice of its records in other cases. This rule, applicable to cases on trial upon their merits, is upon the ground that every litigant whose case is on trial upon the merits has the right to have such record as will enable the appellate courts to review the judgment upon the merits. But this rule has no application where the only question presented for decision is, May the complainant maintain the action? In the circumstances presented the motion to dismiss was nothing more than a proper challenge of petitioners' claim of right to maintain the action. Apparently learned opposing counsel fail to distinguish between these two classes of cases.

As to the right of the district court to take notice of its own records in this exceptional case, please see:

Freshman v. *Atkins*, 269 U. S. 121, 46 S. Ct. 41, 70 L. ed. 193;

Morse v. *Lewis* (4th Cir.), 54 F. (2d) 1027;

Kithcart v. *Metropolitan Life Ins. Co.* (8th Cir.), 88 F. (2d) 407, and cases there cited;

Suren v. *Oceanic S. S. Co.* (9th Cir.), 85 F. (2d) 324.

The Circuit Court of Appeals properly took judicial notice of its own records.

—*National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 74 L. ed. 881;

De Bearn v. *Safe Deposit & Trust Co.*, 233 U. S. 24, 58 L. ed. 833;

Divide Creek Irrigation Dist. v. *Hollingsworth* (10th Cir.), 72 F. (2d) 859.

The case last above cited was upon appeal from a trial on the merits. It was held that the material parts of the record of the former proceeding there in question had to be in evidence in order that a record might be made upon which a review could be had, and hence that in that case it was not proper for the trial court to take judicial notice of the proceedings in another action without making same a part of the trial record. When the reason for a rule fails the rule no longer applies.

The bill of complaint in the new case sets forth the proceedings in the original case, including the final judgment of the Circuit Court of Appeals. It seeks to set aside, avoid and vacate the judgment of the trial court. It seeks a retrial of the same issues that were tried below in the original case. It shows affirmatively that the matters presented again were tried and adjudicated in the original case. It seeks to enjoin the respondents from executing the original judgment. Hence petitioners cannot be heard to say that the district court could not take judicial notice of its own records.

IV.

The complaint presents a mere (fatally defective) bill of review or pretended action of that nature.

It was necessary to procure leave of the United States Circuit Court of Appeals before filing in the district court.

Bills of review, particularly those upon the ground of newly discovered evidence, are not favored by the courts. Their allowance rests upon sound judicial discretion, to be exercised cautiously and sparingly.

The motion to dismiss or to strike was a proper challenge.

—*Southard* v. *Russell*, 16 How. 547, 14 L. ed. 1052;
Durant v. *Storrow*, 11 Otto 555, 25 L. ed. 961;
National Brake Co. v. *Christensen*, 254 U. S. 425, 65 L. ed. 341;
John Simmons Co. v. *Grier Bros. Co.*, 258 U. S. 82, 66 L. ed. 475;
Toledo Scale Co. v. *Computing Scale Co.*, 261 U. S. 399, 67 L. ed. 719;
Continental Oil Co. v. *Osage Oil & Refining Co.* (10th Cir.), 57 F. (2d) 527;
Continental Oil Co. v. *Osage Oil & Refining Co.* (10th Cir.), 69 F. (2d) 19;
In re: Gamewell Telephone Co. (1st Cir.), 73 Fed. 908;
Society of Shakers v. *Watson* (6th Cir.), 77 Fed. 512;
Obear-Nester Glass Co. v. *Hartford-Empire Co.* (8th Cir.), 61 F. (2d) 31;
Hagerott v. *Adams* (8th Cir.), 61 F. (2d) 35;
Simonds v. *Norwich Union Indemnity Co.* (8th Cir.), 73 F. (2d) 412;
Irvin v. *Buick Motor Co.* (8th Cir.), 88 F. (2d) 947.

V.

It is respectfully submitted that speedy end should be made to the false, scandalous and contemptuous charges against the district court and the judge thereof, and appropriate discipline of appellants and their counsel of record seems to be required.

—*Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 67 L. ed. 719;
Wierse v. *United States*, 252 Fed. 435.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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